No. 82-2115

In the

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON as Trustee Under a Trust Agreement, dated March 17, 1975, and known as Trust R-1809,

Appellant,

-vs-

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; and HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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The Appellees (hereinafter collectively referred to as "County Tax Officials") move the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of Illinois on the ground that it is manifest that the questions on which the decision of the case rests are so insubstantial as not to need further argument.

FACTS

The facts of this case are adequately discussed in the Illinois Supreme Court opinion. 93 Ill. 2d at 390-391. A brief summarization is made here for the Court's convenience.

The action involves a 1978 real estate tax assessment dispute relating to appellant's property which is located in Evanston, Illinois, and is commonly known as One American Plaza. For the 1978 tax year, which was the first year of operation of the building, the Assessor proposed an assessment of $8 million which, based on the 40% level of assessment in Cook County, indicated an opinion that the building had a fair cash market value of approximately $20 million. The appellant then persuaded the Assessor to recommend a reduction in assessment utilizing the income capitalization approach to yield an assessment of $3.4 million based on a fair value of approximately $8.5 million. At that time, however, the Assessor had already certified the Evanston tax rolls and could not change the assessment. *See* Ill. Rev. Stat. ch. 120 para. 603. The appellant filed complaints with the Board of Appeals pursuant to Ill. Rev. Stat. ch. 120 para. 594 (1), and the Assessor recommended the assessment be reduced. The complaint disclosed the construction of the building had cost approximately $17 million. It is also clear in this case that the property had been mortgaged for approximately $20 million. Commissioner Semrow testified that the appellant's evidence of value was insufficient to justify the conclusion that the assessment was excessive.

The appellant then paid the lesser amount of taxes it deemed fair and brought this action seeking injunction against the collection of the balance. At trial, the As-

sessor based on additional information withdrew the original recommendation of $3.4 million and stated that if an income approach were to be used, an assessment of $4.3 million was indicated. The Assessor testified, however, that it was not entirely clear that the income capitalization approach was the optimum method of valuation. (R. 174)

The trial and appellate court granted injunctive relief and set the assessment at $3.9 million or a fair cash value of $9.75 million.

The Illinois Supreme Court reversed on the grounds that the case did not present facts which warranted injunctive relief because the appellant had available to it an adequate remedy at law in which any and all claims against the tax could be raised. 93 Ill. 2d at 392. *See*, Ill. Rev. Stat. ch. 120 pars. 697 and 716 (referred to herein as the "objection procedure.")

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THIS CASE PRESENTS NO SUBSTANTIAL QUESTION.

The appellant seeks review of the Illinois Supreme Court's decision which held that appellant, as an Illinois taxpayer, has an adequate legal remedy to seek redress of any claims regarding the real estate tax assessment of its property. *First National Bank of Evanston* v. *Rosewell,* 93 Ill. 2d 388, 392 (1982). *See,* Ill. Rev. Stat. ch. 120, paras. 675 and 716. The appellant's contention that the case should be reviewed here is based on the premise that the adequate remedy at law in Illinois constitutes a deprivation of due process in that it requires a taxpayer to pay the full amount of taxes under protest but provides no interest if the taxpayer obtains a refund. The appellant contends the failure to pay interest is contrary to this Court's ruling in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155, 101 S.Ct. 446 (1980). In addition, the appellant urges the Illinois Supreme Court's decision in *Shell Oil Co.* v. *Department of Revenue,* 95 Ill. 2d 541 (1983) is somehow in conflict with the decision reached in this case and should therefore be reviewed.*

An analysis of the appellant's claims in light of the applicable provisions of law and governing cases will demonstrate the lack of substance in appellant's case.

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* There is no authority for this Court to engage in appellate or certiorari review of *Shell* in this case.

The appellant argued in this case that the failure of Illinois to pay interest on a real estate tax refund rendered the Illinois legal remedy "inadequate". Both the courts of Illinois and this Court have held that the failure to pay interest does not render the Illinois remedy inadequate. *See, e.g, Rosewell* v. *La Salle National Bank*, 450 U.S. 503 (1981); *Clarendon Associates* v. *Korzen*, 56 Ill. 2d 101 (1973); *Lakefront Realty Corp.* v. *Lorenz*, 19 Ill. 2d 114 (1960). Indeed, in *Rosewell*, this Court held that interest claims were properly raised in the Illinois objection procedure. In the case at bar, the Illinois Supreme Court followed the foregoing authorities. So viewed, the appellant's argument on the interest question is really an attempt to relitigate the *Rosewell* case. This case, therefore, presents no substantial question.

Moreover, the claim that the Illinois objection procedure is violative of due process because no interest is awarded to a successful tax objector is not a question properly presented to the Court in this case for the following cogent reasons.

First, the appellant's argument assumes it would be entitled to a refund if it had pursued the legal remedy.*

The fact is that the appellant has not pursued the Illinois legal remedy and has not been refused interest on

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* The property was valued at approximately $20 million. Given the fact that the recent construction cost of the building was $17 million and the property was mortgaged for $20 million, the assumption that the property is not worth $20 million is tenuous at best. *See* American Institute of Real Estate Appraisers, *The Appraisal of Real Estate*, p. 507, 7th Ed. 1978.

a refund. The failure of the Illinois legal remedy to provide for interest on a refund cannot violate any alleged right until it is first determined that a refund is due and interest is refused. Consequently, the appellant does not have standing to raise the claim. Second, the appellant admits that the due process claim was not raised in the trial court but rather was raised for the first time in the Illinois Supreme Court. This constitutes a clear waiver under state law. *Snow* v. *Dixon*, 66 Ill. 2d 443 (1977). Third, since the appellant has not pursued the Illinois remedy, the claim is not "ripe" for adjudication since a full formulation and presentation of the claim has not been made. *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Younger* v. *Harris*, 401 U.S. 37 (1971). As held in *Rosewell* and in the case at bar, the interest question as well as any constitutional claim is properly litigated in the Illinois objection procedure.

Based on the foregoing analysis, it is manifest that the case presents no substantial question and the appeal should be dismissed.

II. IN THE ALTERNATIVE THE DECISION OF THE ILLINOIS SUPREME COURT SHOULD BE AFFIRMED.

Consideration of the result of the Illinois Supreme Court decision also discloses that it is abundantly correct and should be affirmed.

The result of the decision is that the appellant, as an Illinois taxpayer, should raise any and all claims regarding its tax liability in the forum provided in the

adequate Illinois legal remedy.* This is exactly the result achieved by this Court in *Rosewell*.

Moreover, analysis of the due process claim shows that the failure of Illinois to pay interest on a refund is not a constitutionally prohibited taking. The appellant's argument relies on *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155; 101 S. Ct. 446 (1980). A mere reading of *Webb's* in light of the facts of this case shows that it is inapposite.

The decision in *Webb's* involved a deposit of funds by a purchaser with the clerk of the court prior to the initiation of an interpleader action. The clerk deducted and retained a statutory fee from the funds and deposited the balance pursuant to a count order in an interest-bearing account. At the conclusion of the interpleader action the clerk refused to refund the earned interest.

In ruling that the retention of the earned interest was a prohibited "taking," this Court relied upon the fact that the money was "concededly private" (a concession not made here) and that interest retention could not be justified as promoting the general welfare. 101 S. Ct. at 452. Significantly, the Court also stressed that under Florida law the court clerk already had received a fee "for services rendered" in connection with accepting the interpleader fund and stated:

> We express no view as to the constitutionality of a statute that prescribes a county's retention of interest

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* The question whether the appellant may yet pursue the legal remedy regarding the subject property is not before this Court. The appellant has not yet attempted to pursue this route and the appellees have taken no position on the question.

> earned, where the interest would be the only return to the county for services it renders.

101 S. Ct. at 452.

In the present case, real estate taxes paid under protest are not "private" funds. To the contrary, the County Collector has a claim or right to the taxes even prior to the issuance of the tax bills. Ill. Rev. Stat. ch. 120, par. 697. This lien and claim of right is not affected until the court adjudicates the correctness of the assessment. *See, Morton Grove Park Dist.* v. *American National Bank,* 78 Ill. 2d 353, 364-365 (1980). This lien and claim of right thus extinguishes, *pro tempore,* the private character of tax payments until a judicially established overassessment is declared.

In addition, the requirement of payment under protest of the full amount of taxes due promotes the general welfare. It ensures that the risk of taxpayer insolvency does not shift to the county. *See, Perez* v. *Ledesma,* 401 U.S. 82, 128 (1971). Taxpayers are provided a forum for redress of tax grievances and stability in local governmental finance is promoted. *See Rosewell* v. *La Salle National Bank,* 450 U.S. 503, 528 (1981).

The Illinois Supreme Court in this case also correctly observed that there is no fee charged by the Collector as there was in *Webb's* so that the *Webb's* case was distinguishable on that ground as well. The appellant's only response to this point is that the Illinois Supreme Court's decision in *Shell Oil Co.* v. *Department of Revenue,* 95 Ill. 2d 541 (1983), conflicts with the decision reached in the case at bar.

The argument fails to provide any cogent reason why this Court should review this case. *Shell* permitted an award of interest to a retail occupation taxpayer from funds which, as in *Webb's*, were deposited in an interest bearing account pursuant to court order. *Shell* noted the general rule that even under the law applicable to retail occupation taxes interest would not generally be recoverable as a matter of course. 95 Ill. 2d at 547. *Shell* granted relief because the moneys had been paid into court and were held pursuant to court order. Significantly, there was also statutory authority to support the interest award and no provision of law authorized the retention of the interest under the circumstances of the case.

Shell has no bearing on this case. If anything, *Shell* shows that the Illinois courts will entertain claims for interest on refunds when the legal remedies are followed. So viewed, the Illinois Supreme Court in the case at bar held correctly that the appellant's claims were not properly raised in an injunctive proceeding.

CONCLUSION

The decision rendered by the Illinois Supreme Court in this case is consistent with precedent well-established both in Illinois and by this Court. No substantial or significant question is presented. Either the appeal should be dismissed or the decision of the Illinois Supreme Court should be summarily affirmed.

Respectfully submitted,

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